



March 30, 2001

Ms. Elaine S. Hengen
Assistant City Attorney
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR2001-1273

Dear Ms. Hengen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145472.

The El Paso Police Department (the "department") received a request for "[a]ny and all incident reports concerning escaped inmate Larry James Harper, dob 9-10-63," and "[a]ny and all case files concerning Larry James Harper's three sexual assault cases, and any other cases he may have been involved in." You ask whether the requested information is excepted in its entirety under section 552.101 of the Government Code in conjunction with the common law right to privacy, and if not, assert that portions of the requested information are excepted from disclosure under section 552.101 in conjunction with common law privacy and section 261.201 of the Family Code, as well as under section 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses common law privacy. Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). In this instance, the requestor asks for all of a named individual's criminal records, and therefore, we believe that the individual's privacy rights have been implicated. We note, however, that the right of privacy is purely personal and

lapses upon death. See *Moore v. Charles B. Pierce Film Enterprises Inc.*, 589 S.W.2d 489 (Tex. Civ. App.--Texarkana 1979, writ ref'd n.r.e.); see also Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981). In this instance, the individual whose records are at issue is deceased. Therefore, we conclude that the requested information may not be withheld based upon any privacy right of Mr. Harper.

You also argue, however, that portions of the information contained within the responsive records are excepted from disclosure under section 552.101 in conjunction with the common law privacy rights of individuals other than the deceased. The doctrine of common law privacy protects information if it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person and the public has no legitimate interest in it. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. Any information tending to identify a sexual assault victim must be withheld pursuant to common law privacy. See Open Records Decision No. 393 (1983), 339 (1982). In this case, we have no indication that the identities of the victims of sexual assault have been revealed. Accordingly, we have marked the types of identifying information in exhibits D-G that you must withhold under section 552.101 to protect the privacy of the sexual assault victims, which includes information identifying many of the witnesses. In addition, we have marked certain information within these exhibits that must be withheld to protect the privacy rights of other individuals.¹

Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold any Texas driver's license numbers, vehicle identification numbers, and license plate numbers under section 552.130, except for those of Mr. Harper. Section 552.130 is designed to protect the privacy interest of the individual. As noted above, this office has determined that privacy rights lapse upon the death of the subject. Therefore,

¹As we believe common law privacy makes confidential the information you seek to withhold under section 261.201 of the Family Code, we need not address your argument under that provision.

section 552.130 does not except from disclosure the driver's license number, vehicle identification number, and license plate number of a deceased individual.

Finally, we also note that the submitted records contain social security numbers. A social security number may be confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if the social security number was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990*. See Open Records Decision No. 622 at 2-4 (1994). Because this federal provision is intended to protect the privacy interests of individuals, we do not believe that this provision encompasses the social security number of a deceased individual. However, the submitted records contain other social security numbers that may be confidential under section 552.101 in conjunction with the federal law. You have cited no law, nor are we aware of any law enacted on or after October 1, 1990, that authorizes the department to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security numbers in question were obtained or are maintained pursuant to such a law and are therefore confidential under the federal law. We caution you, however, that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information. Therefore, prior to releasing any of the social security numbers other than that of Mr. Harper, the department should ensure that the numbers were not obtained and are not maintained pursuant to any provision of law enacted on or after October 1, 1990.

To summarize, the department must withhold the information we have marked, and some of the information you have marked, as indicated, under common law privacy and section 552.101 of the Government Code. The department must withhold any Texas driver's license numbers, vehicle identification numbers, and license plate numbers under section 552.130, except for those of Mr. Harper which must be released. Social security numbers must be withheld only if they were obtained and maintained pursuant to any provision of law enacted on or after October 1, 1990, except that belonging to Mr. Harper, which must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general

have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 145472

Encl. Submitted documents

cc: Ms. Tami Sheheri
ABC News
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(w/o enclosures)